

Evidence Based Pretrial Release and Monitoring in Wisconsin

August 2018

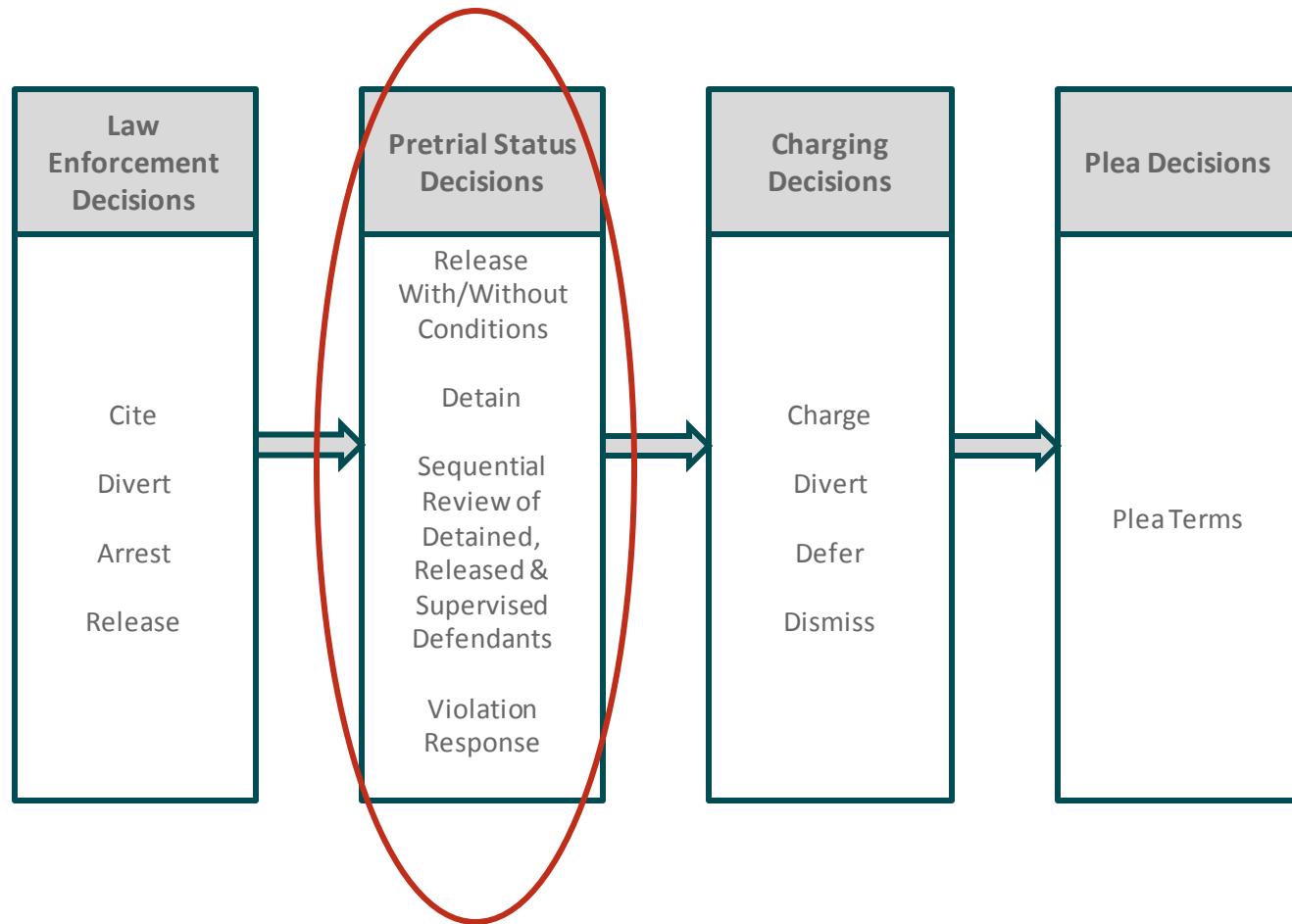
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Circuit Judge Milwaukee (ret.)

Pretrial Justice

- » After a person is arrested, judicial officers must decide:
 1. Will this person be released?
 2. Will this person be detained?
 3. If released, what will be the release conditions?
- » Pretrial decisions can have significant impact:
 - Public safety pretrial
 - Case disposition
 - Likelihood of receiving a sentence to incarceration
 - Length of the sentence to incarceration
 - Public safety post-disposition

Overview of EBDM Pretrial Decision Points



“Legal”

- » Presumption of Innocence
- » Right to (or Presumption of) Release
 - Release must be the norm
 - Two constitutionally valid purposes for limiting pretrial freedom:
 - Court appearance and public safety
 - “[D]etention prior to trial ... is the carefully limited exception.”
U.S. v Salerno (U.S. Supreme Court, 1987)
- » Non-Excessive Bail
 - Least restrictive conditions
- » Due Process
- » Equal Protection
- » Individualized Bail Setting

BAIL

- » **969.001 (1)** “Bail means monetary conditions of release.
- » **969.01 Eligibility for release.** (1) Before conviction. A defendant arrested for a criminal offense is eligible for release under *reasonable conditions* designed to assure his or her appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses. *Bail may be imposed at or after the initial appearance only upon a finding by the court that there is a reasonable basis to believe that bail is necessary to assure appearance in court.*

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- 969.01(1)the judge shall first consider the likelihood of the defendant appearing for trial if released on his or her own recognizance.
 - 969.01(4) Considerations in setting conditions of release

If bail is imposed, it shall be only in the amount found necessary to assure appearance of the defendant. Conditions of release other than monetary conditions may be imposed for the purpose of protecting members of the community from serious bodily harm or preventing intimidation of witnesses

969.02 Release of defendants charged with misdemeanors.

The Judge may:

(d) Impose any other condition deemed reasonably necessary to assure appearance as required *or any nonmonetary condition deemed reasonably necessary to protect members of the community from serious bodily harm or prevent intimidation of witnesses*

969.03 Release of defendants charged with felonies.

The Judge may:

(e) Impose any other condition deemed reasonably necessary to assure appearance as required *or any nonmonetary condition deemed reasonably necessary to protect members of the community from serious bodily harm or prevent intimidation of witnesses*

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- » American Bar Association Standard 10-1.1 “The law favors release of defendants pending adjudication of charges.”
 - » National District Attorneys Association Standards on Pretrial Release 45.2.1 “Whenever possible, release before trial should be on the recognizance of the accused”... “Reliance on money bail should be discouraged and be required only in those cases in which less restrictive conditions will not reasonably ensure the defendant’s appearance.”

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- » American Bar Association Pretrial Release Standards 10-1.10(a) “Every jurisdiction should establish a pretrial services agency or program to collect and present the necessary information, present risk assessments, and, consistent with court policy, make release recommendations required by the judicial officer in making release decisions, including the defendant’s eligibility for diversion, treatment, or other alternative adjudication programs, such as drug or other treatment courts. Pretrial services should also monitor, supervise, and assist defendants release prior to trial, and review the status and release eligibility of detained defendants for the court on an ongoing basis”.

Foundational Concepts

» Pretrial Justice

- The need to balance competing goals
 - Protect the public
 - Assure court appearance
 - Preserve legal and constitutional rights afforded persons awaiting trial

“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception” U.S. v. Salerno (1987)

Foundational Concepts

» Pretrial Legal and Evidence-Based Practices

- If we conducted research to determine the most effective way to assure public safety and court appearance, what would the research show

DETAIN EVERYONE

» Goal

- Assure public safety and court appearance
 - Detain highest risk defendants
 - Release moderate risk defendants with interventions and services targeted to mitigate risk
 - Release low risk defendants with minimal or no conditions

Applying EBDM to Pretrial Release & Detention

Measuring & Managing Risk – What the Evidence Tells Us

◆ Risk is Inherent in Pretrial Release

- Our system of justice DEMANDS that we take risk for most pretrial defendants
- Question is not IF we take risk – Question is “How well do we MEASURE risk and how well do we MANAGE it”
- Release and detention decisions focus primarily on the charge not the risk posed
- Pretrial release and detention is often determined by resources not risk
- Enhancing public safety and being good stewards of public funds requires us to manage release and detention based on RISK



Applying EBDM to Pretrial Release & Detention

Measuring & Managing Risk – What the Evidence Tells Us

- ◆ Monetary bail does not improve court appearance rates for defendants and can have negative consequences
- ◆ Monetary bail does not improve community safety
- ◆ Implementing differential pretrial supervision strategies based on pretrial risk does improve pretrial outcomes
- ◆ Jurisdictions that employ court reminder notification procedures have significantly reduced FTA rates

Pretrial Justice

» Pretrial goals

1. Maximize public safety and law abiding behavior
2. Maximize court appearance
3. Maximize pretrial release/minimize pretrial detention

» Pretrial success

- A released defendant who appears in court and does not engage in pretrial misconduct

» Pretrial failure

- A released defendant who fails to return to court and/or engages in pretrial misconduct
- A defendant who is detained unnecessarily who experiences collateral consequences

Pretrial Justice in Wisconsin

» Considerable variation in practice

- Some counties do not assess pretrial risk
- Where risk is assessed, a variety of risk assessment tools are used
- Some counties do not provide pretrial supervision
- Where supervision is provided, practices vary
- Varying practices throughout the state around the use of secured and unsecured conditions
- Data definitions vary
- Data collection/analysis varies

» Practices in one county can and does affect others

Wisconsin Pretrial Pilot Project

- » The pretrial pilot seeks to test a set of legal and evidence-based practices
 - Consistently, while at the same time recognizing variation in local practices and resources
 - Consistent use of a pretrial risk tool (the PSA)
 - Consistent data definitions & capture
 - Consistent supervision practices
 - Learn from/modify the model
 - Replicate elsewhere in the state

Pretrial Risk Assessment

» Pretrial risk assessment

- The PSA is an actuarial pretrial risk assessment – an objective, statistically-based resource that uses pretrial risk factors to assess a person’s likelihood of pretrial success or failure
 - A pretrial risk factor is a characteristic that, when present (e.g., criminal history), indicates an increased risk of pretrial failure
- » **The results of a pretrial risk assessment can be used alongside other information to inform the release/detention decision**
- » **The assessment is not intended to “drive” the decision but instead, to *inform* the decision**

Pretrial Risk Assessment

- » Hundreds of jurisdictions use pretrial risk assessments
- » More than two dozen different assessments exist
- » Most pretrial risk assessments measure a person's likelihood of:
 1. Making court appearances
 2. Not being arrested for new criminal activity
- » Many of the assessments use the same core group of risk factors:
 - Age
 - Criminal history
 - Past failures to appear in court
 - Pending cases
 - Current offense

Public Safety Assessment: Origins

- » PSA was developed in 2013 by the Laura and John Arnold Foundation (LJAF)
- » LJAF's Criminal Justice Initiative strives to identify opportunities that will advance community safety and the values of equity, fairness, effectiveness, and racial justice.
- » **Pretrial Justice & Risk Assessment**
 - LJAF sought input from policymakers and practitioners to shape their research agenda
 - Many emphasized the importance of the pretrial release/detention decision
 - Despite six decades of research, low adoption rate of validated pretrial risk assessment tools
 - Existing assessments were resource-intensive; many were jurisdiction-specific; none provided information about the potential for pretrial violence

PSA's Innovations

» The Foundation sought to develop a pretrial risk assessment tool that:

1. Separately reported prediction of failure to appear and prediction of new criminal activity
2. Also provided new violent criminal activity prediction
3. Used non-interview-dependent risk factors
4. Improved overall predictive accuracy
5. That could be used anywhere in the U.S.
6. That would be made available without cost

PSA Risk Factors

Risk Factor	Pretrial Outcome		
	FTA	NCA	NVCA
1. Age at current arrest		X	
2. Current violent offense			X
2a. Current violent offense & 20 years old or younger			X
3. Pending charge at the time of the offense	X	X	X
4. Prior misdemeanor conviction		X	
5. Prior felony conviction		X	
5a. Prior conviction	X		X
6. Prior violent conviction		X	X
7. Prior failure to appear pretrial in past 2 years	X	X	
8. Prior failure to appear pretrial older than 2 years	X		
9. Prior sentence to incarceration		X	

PSA Validation

- » **Validated the PSA on over 500,000 new cases**
 - Localities in the U.S. Northeast, Southwest, & Midwest, and 2 states

- » **Results confirmed the nine risk factors and the weighting of each risk factor**

PSA General Scoring Instructions

» Who gets assessed with the PSA?

- Only adults
- Not people who are already incarcerated

» What data is used to score the PSA?

- Adult criminal history
- Adult court appearance history
- Traffic and criminal charges that carry a potential penalty of incarceration

» What data is not used to score the PSA?

- Juvenile records are not considered
- Non-criminal traffic are not counted
- Ordinance violations are not counted
- Self-reported information (e.g., from an interview) is not used

Pretrial Risk Management

- » We measure risk so we can manage that risk
- » Pretrial legal and evidence-based practices:
 - Least restrictive conditions
 - Risk principle
 - Practices that are shown to be effective

Improving Court Appearance

» What works and doesn't work?

- Pretrial detention
 - Can assure court appearance
 - Use is legally limited
 - Expensive
- Court Date Reminders
 - Can improve court appearance by approximately 30 to 50%
- Pretrial monitoring/supervision: mixed results
 - For “lower” risk persons: little benefit or negative benefit
 - For “moderate” and “higher” risk persons: some increase in appearance
- Secured money bail: little support
 - Most studies fail to show that secured financial conditions increase appearance
 - Two studies show that unsecured conditions achieve the same appearance rates as secured conditions
 - No study shows that higher monetary amounts increase appearance

Improving Public Safety

» Pretrial detention

- Can increase public safety/law-abiding behavior
- Use is legally limited
- Expensive

» Pretrial monitoring/supervision: mixed results

- For “lower” risk persons: little, no, or negative benefit
- For “moderate” and “higher” risk persons: mixed results for law-abiding

» Secured money bail: little support

- All studies fail to show that secured financial conditions improve public safety
- No study shows that higher monetary amounts improve rates

Decision Making Framework

» DMF Goals

- Identifies a proposed release/detention recommendation designed to manage risk in the most effective manner
- Considers
 - Current charge +
 - PSA results (FTA scale, NCA scale, NVCA flag)
- Guides recommendations intended to
 - Detain, when allowable, highest risk defendants
 - Release moderate risk defendants with conditions targeted to mitigate risk
 - Release low risk defendants with minimal or no conditions

DRAFT**WISCONSIN PRETRIAL DECISION MAKING FRAMEWORK****DRAFT**

	NCA 1	NCA 2	NCA 3	NCA 4	NCA 5	NCA 6
FTA 1	Level 1 & ROR	Level 1 & ROR				
FTA 2	Level 1 & ROR	Level 1 & ROR	Level 2 & ROR	Level 3 & ROR	Level 4 & ROR	
FTA 3		Level 2 & ROR	Level 2 & ROR	Level 3 & ROR	Level 4 & ROR	Level 5 & Financial
FTA 4		Level 2 & ROR	Level 3 & ROR	Level 4 & ROR	Misd. - Level 5 & ROR Fel. - Level 5 & Financial	Level 5 & Financial
FTA 5		Level 3 & ROR	Level 3 & ROR	Misd. - Level 4 & ROR Fel. - Level 5 & ROR	Level 5 & Financial	Level 5 & Financial
FTA 6				Level 5 & Financial	Level 5 & Financial	Level 5 & Financial

	Level 1	Level 2	Level 3 (Standard)	Level 4 (Enhanced)	Level 5 (Intensive)	Level 5 (Intensive)
Bail	ROR	ROR	ROR	ROR	ROR	Cash
Face-to-Face Contact	No	No	1x/month	Every other week	Weekly	Weekly
Alternative Contact	No	1x/month	1x/month	Every other week	No	No
Supervised Conditions	No	No	As Authorized	As Authorized	As Authorized	As Authorized
Court Date Reminder	Yes	Yes	Yes	Yes	Yes	Yes
Criminal History/CJIS	No	Yes	Yes	Yes	Yes	Yes

NOTE: SAMPLE DOCUMENT. AUTHORIZED CONDITIONS WILL VARY BY COUNTY

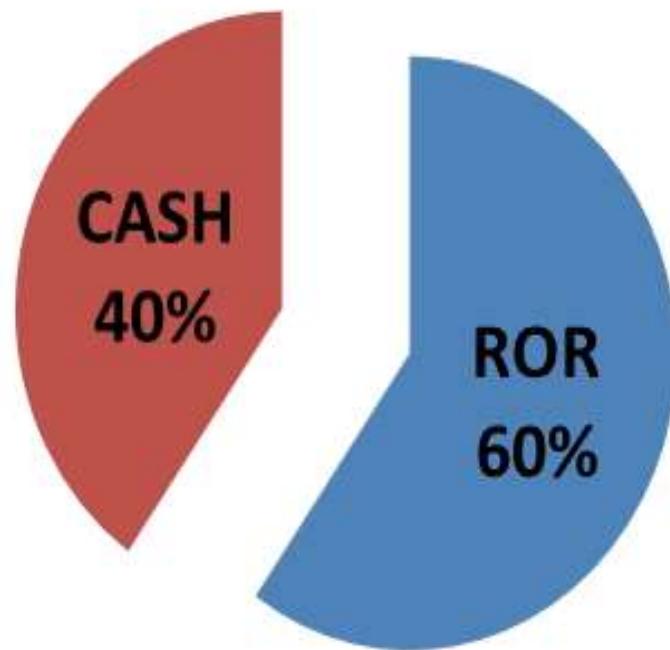
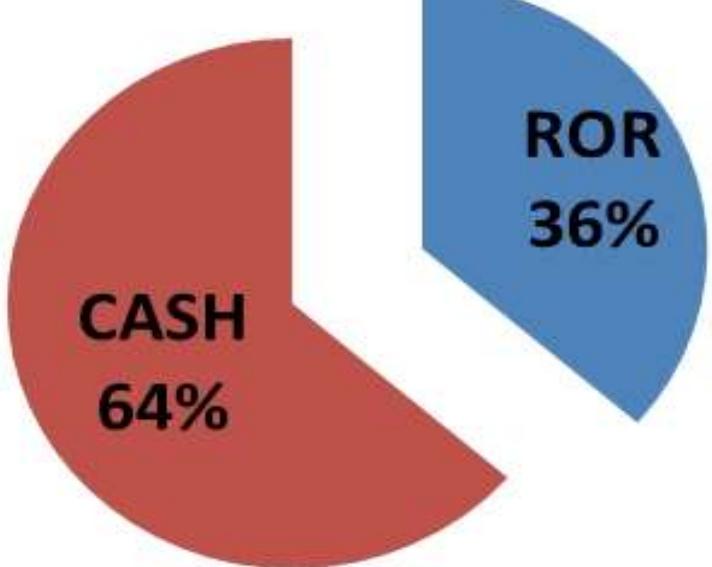
Condition	Authorized
Drug Testing	Defendant Level 3 or greater supervision on the DMF AND Scores X or greater on substance use screen AND has a history of illegal drug use/abuse
Portable Breathalyzer	Defendant Level 3 or greater supervision according to DMF AND Scores X or greater on substance use screen AND (has a history of problematic alcohol use/abuse OR current alcohol abuse) OR charged with an OWI case AND qualifies for supervision
Absolute Sobriety	Defendant has score of X or greater on substance use screen and a history of alcohol abuse or current alcohol abuse OR Police report and/or criminal complaint indicate the defendant was intoxicated at time of arrest OR charged with an OWI case and qualifies for supervision
GPS Monitoring	Defendant charged with a felony non-OWI offense, is subject to DMF Step 2 OR scored Level 5 Supervision and charged with a violent offense OR Concern for victim safety
SCRAM	Defendant charged with an OWI offense and qualifies for Level 3 Supervision according to the DMF AND if any 1 of the following is true: Scores X or higher on substance use screen OR Currently on pretrial release for an OWI at time of alleged new OWI OR Charged with 3rd or greater OWI. If defendant does not qualify for supervision, private pay SCRAM is an option depending upon program capacity.

MILWAUKEE COUNTY OUTCOMES 2017

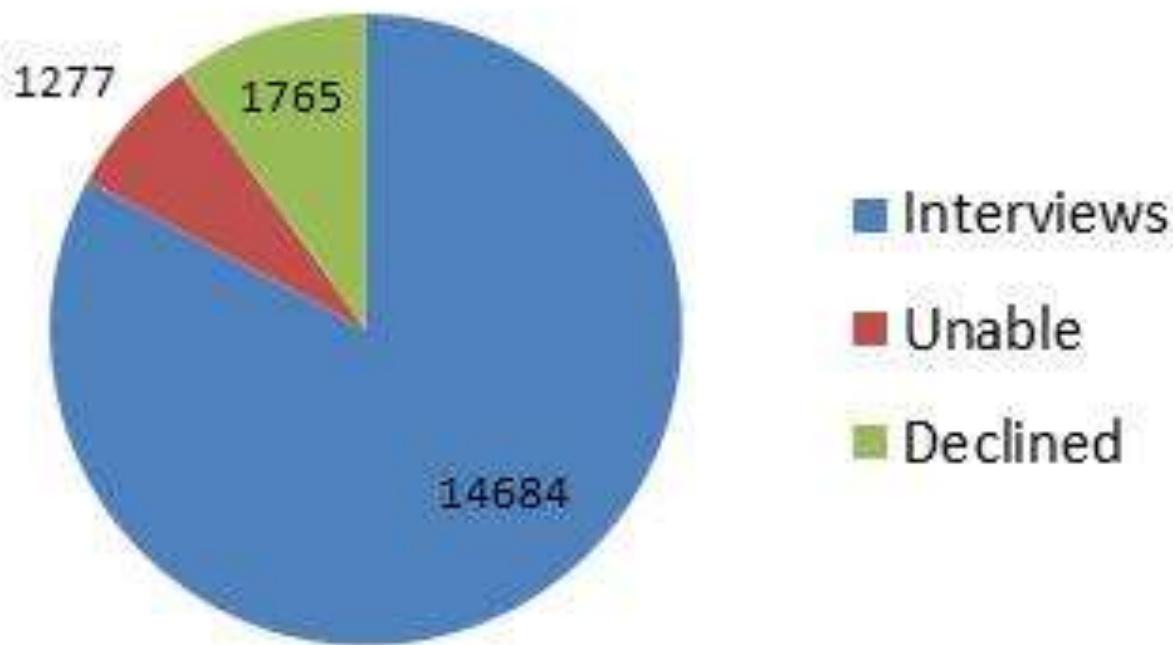
BOND TYPE COMPARISON PRE & POST SYSTEM CHANGES

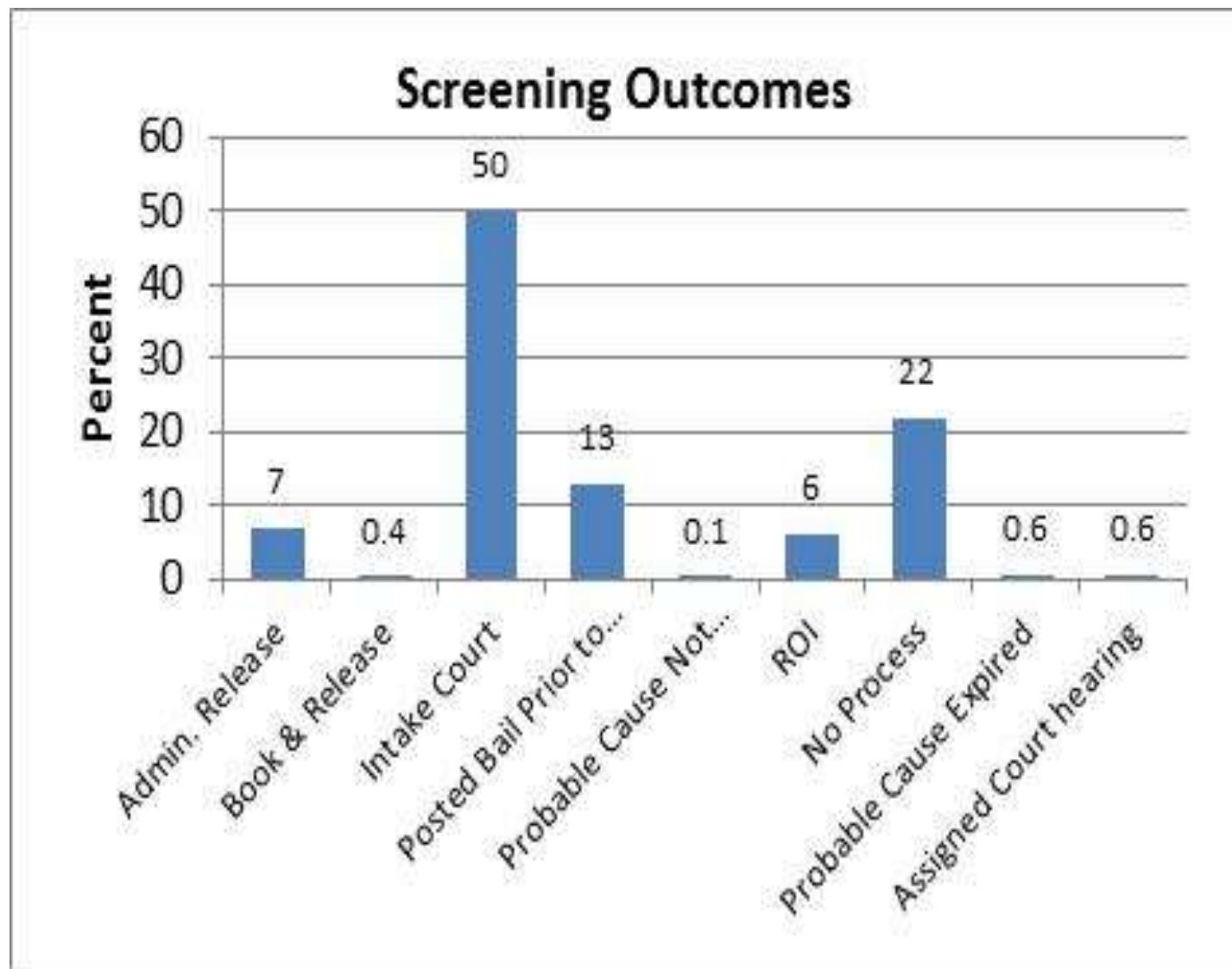
2009 BOND TYPE
PRE-PT SCREENING

2012 BOND TYPE
POST PT SCREENING

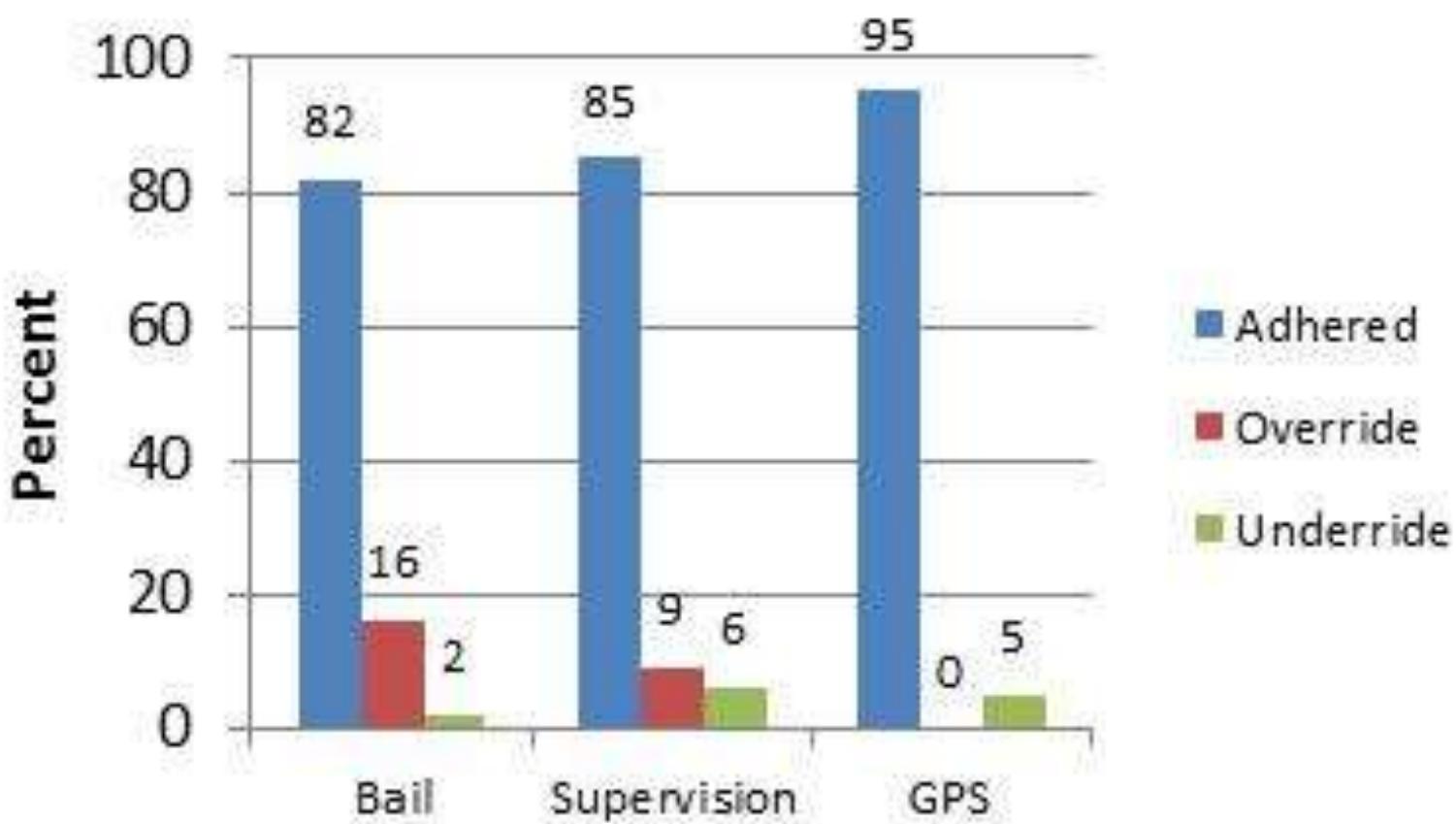


Universal Screening Completed (N=17,726)

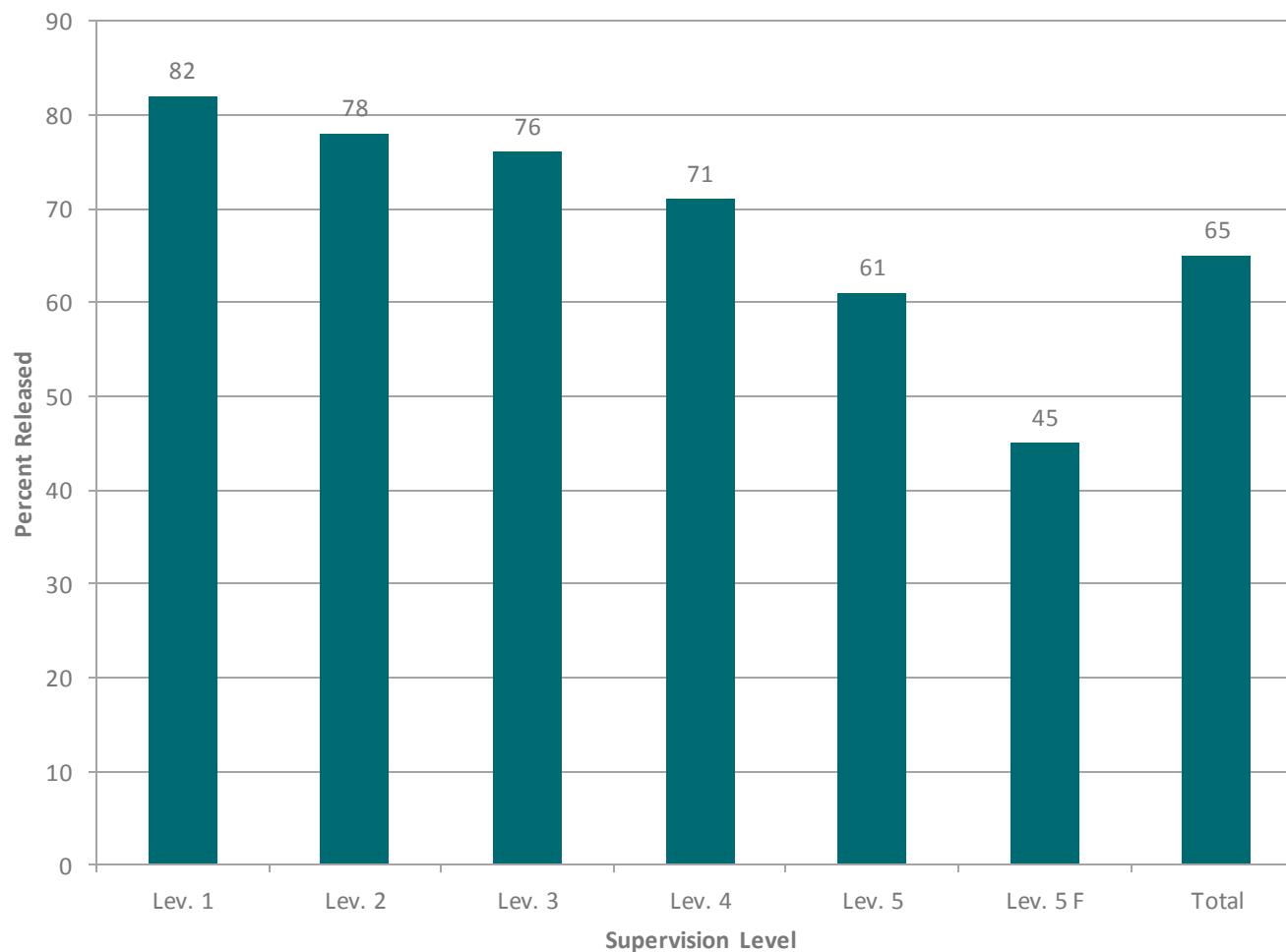


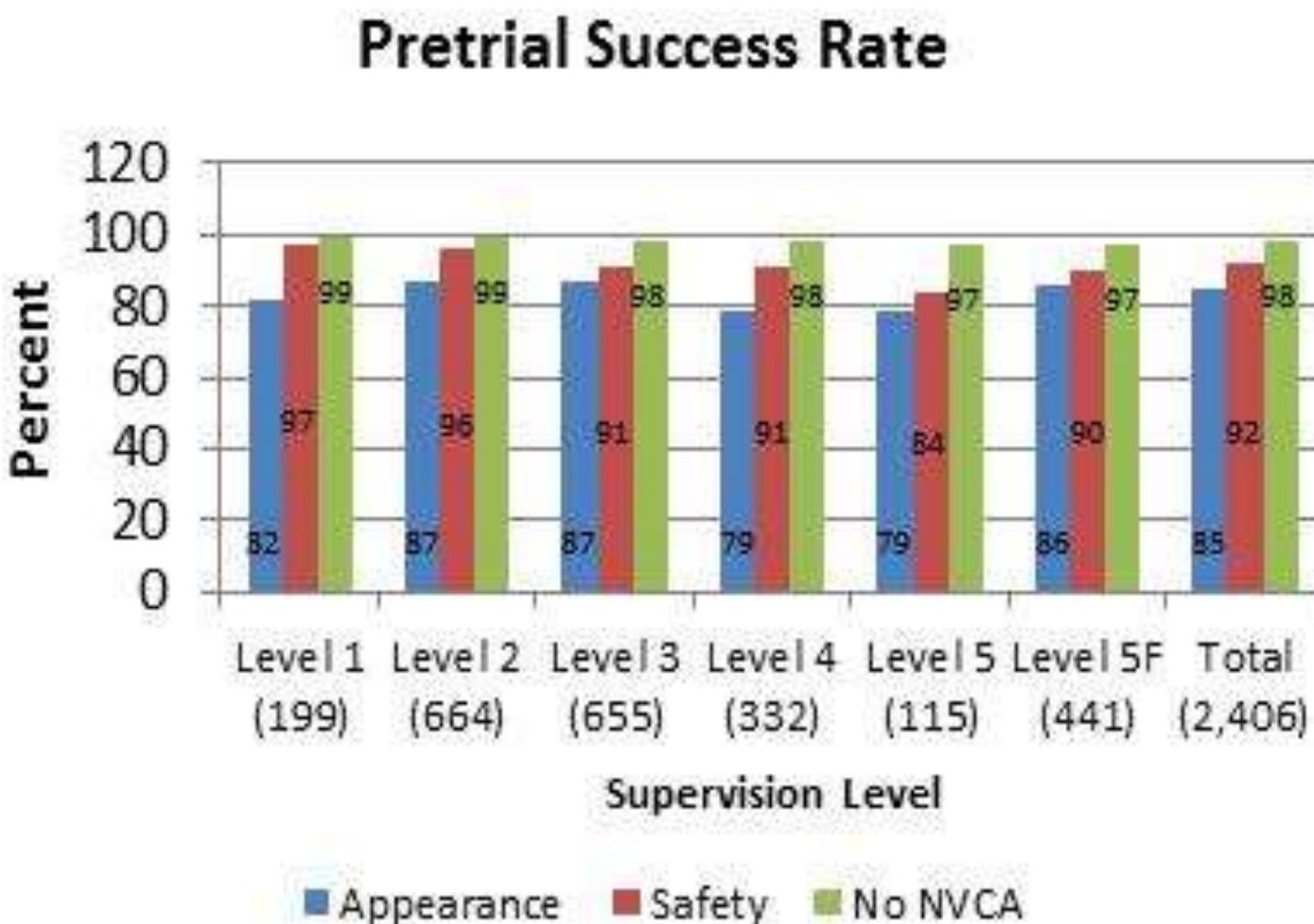


DMF Adherence



Percent Released (N=3,390)





969.035 Pretrial detention

- » A circuit court may deny release from custody...
 - A person accused of committing or attempting to Commit certain offenses.
 - A pretrial detention hearing is required where DA must show by clear and convincing evidence that the Defendant committed the crime.
 - The defendant has the right of confrontation, access to Police reports and rules of evidence apply meaning no hearsay

Next Steps

- Preventative Detention
- Statewide Pretrial resources
- Statewide Data systems